**MV 97-4**
**Tax Type: MOTOR VEHICLE USE TAX**
**Issue: Rolling Stock (Vehicle Used Interstate For Hire)**

**STATE OF ILLINOIS**
**DEPARTMENT OF REVENUE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**CHICAGO, ILLINOIS**

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| **THE DEPARTMENT OF REVENUE** | ) | Case No. |
| **OF THE STATE OF ILLINOIS,** | ) | Reg. No. |
| v. | ) | NTL No. |
| **TAXPAYER,** | ) | John E. White, |
| Taxpayer. | ) | Administrative Law Judge |

## RECOMMENDATION FOR DISPOSITION

**Appearances:** Kurt E. Vragel, Jr. for taxpayer; John D. Alshuler, for the Illinois Department of Revenue ("Department").

**Synopsis:**

This matter arose after TAXPAYER ("TAXPAYER" or "Taxpayer") protested the Department's issuance of Notice of Tax Liability No. ("NTL") XXXXX to taxpayer. That NTL corrected two separate use tax returns taxpayer filed regarding its purchase of two garbage trucks, on which returns taxpayer claimed the trucks were exempt rolling stock.

A hearing on taxpayer's protest was held at the Department's Office of Administrative Hearings on September 13, 1995. The issue at hearing was whether the garbage trucks purchased and used by taxpayer were subject to the Illinois Use Tax Act's ("UTA") rolling stock exemption, 35 **ILCS** 105/3-55(c). Taxpayer presented evidence consisting of books and records and the testimony of its President,

TAXPAYER PRESIDENT. I have considered the evidence adduced at that hearing, and I am including in this recommendation specific findings of fact and conclusions of law. I recommend the issue be resolved in favor of the Department.

**Findings of Fact:**

1. Taxpayer was an Illinois corporation engaged in the business of providing refuse removal services for customers. *See* Taxpayer Exhibit Number ("Ex. No.") 6; Hearing Transcript, pages ("Tr. pp.") 49-51.
2. Taxpayer purchased two garbage trucks on or about May 4, 1990, from an Illinois retailer. Taxpayer Ex. No. 1.
3. Taxpayer's witness at hearing, TAXPAYER PRESIDENT ("TAXPAYER PRESIDENT"), was taxpayer's President at the time of taxpayer's truck purchases. Tr. p. 12.
4. Taxpayer kept the trucks garaged in Hillside, Illinois. They were never kept at its Lombard office. Tr. p. 67.
5. When it purchased the trucks, taxpayer was registered with the Illinois Commerce Commission as an exempt interstate motor carrier of property. Taxpayer Ex. No. 2, p. 7.
6. Taxpayer's customers were businesses, condominiums and apartment complexes located in Chicago. Tr. p. 46; *see also*, Taxpayer Ex. No. 6 (contract used by taxpayer). At any given time, taxpayer had several hundred customers. Tr. p. 48.
7. Taxpayer used the trucks in its refuse removal business. Tr. pp. 39-41.

8. Taxpayer used the trucks in its business by emptying garbage[1] it collected from dumpsters at its customer's locations into the trucks, then transporting the garbage to area landfills for disposal. Tr. pp. 39-41.

9. Taxpayer decided which landfill it would use on any given day or route. *See* Taxpayer Ex. No. 6; Tr. p. 80.

10. Taxpayer dumped the garbage it was paid to collect either at the Congress or Sexton landfills in Hillside, Illinois (Tr. pp. 83-85), the same suburb where taxpayer kept its garbage trucks (Tr. p. 67), or at the Indiana landfill in Gary, Indiana. Taxpayer Group Ex. No. 5; Tr. pp. 39-41.

11. Taxpayer paid whatever fee each landfill charged. Tr. p. 85; Taxpayer Group Ex. No. 5 (charge identified as "tipping fee"). The Indiana landfill charged taxpayer less tipping fees than did the Illinois landfills. Tr. p. 85.

12. Taxpayer used the same written contracts during the course of its collection and disposal business. Taxpayer Ex. No. 6; Tr. p. 49.

13. The full text of Taxpayer's contracts is set forth on the following two pages. The front page of taxpayer's contracts provided:

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[1]. I will use the terms "refuse" and "garbage" interchangeably throughout this decision.

[taxpayer's logo]

REFUSE REMOVAL AGREEMENT

THIS AGREEMENT MADE, commenced, and entered into this ___ day of _____, 19__, by and between _____, hereinafter referred to as the customer, and TAXPAYER Disposal Company, Inc., hereinafter referred to as the contractor.

WITNESSETH:

Whereas contractor desires to provide refuse removal service for customer at [address].

The contractor agrees to empty the [number of containers at customer's address] provided by contractor _____ days per week, Sundays and Holidays excepted, for a charge of _____ per month. The initial rate is based on the service described above. It is understood that the service furnished may be adjusted at the customer's discretion and prices changed accordingly.

Customer acknowledges this agreement is contingent upon local licensing.

| TAXPAYER DISPOSAL COMPANY, INC.: | | CUSTOMER: | |
|---|---|---|---|
| By | [signature] | By | [signature] |
| Title | [title of signatory] | Title | [title of signatory] |

PLEASE RETURN WHITE COPY

- See Reverse Side -

Taxpayer Ex. No. 6.

14. The back of Taxpayer's contracts provided:

## CONDITIONS OF AGREEMENT

CONTRACTOR'S RESPONSIBILITIES:

Contractor shall collect and dispose of all waste material of the customer placed in the containers provided by the contractor at the service address and location, and the frequency of service indicated. Contractor shall not be required to accept any toxic, flammable or otherwise hazardous wastes placed in the containers provided.

CUSTOMER'S RESPONSIBILITY:

Customer acknowledges that it has care, custody and control of equipment owned by the contractor, and accepts responsibility for the equipment except when it is being pysically [sic] handled by employees of the contractor, therefore, customer, expressly agrees to defend, indemnify and hold harmless the contractor from and against any and all claims for loss of or damage to property, or injury to or death of person or persons resulting from or arising in any manner or out of the customer's use, operation or possession of the equipment furnished under this contract.

PAYMENT:

Customer acknowledges invoices are due upon receipt unless otherwise noted and that unpaid balances over 30 days are subject to maximum rate of interest allowable by law.

TERMS:

The initial term of this agreement shall be for a period of one year from the date of commencement of service, as is indicated by this agreement. At expiration of said initial term, and each renewal term thereafter, this agreement shall be considered to be automatically renewed for additional one year renewal terms, unless either party shall notify the other party in writing by certified letter not less than sixty days prior to the expiration of the current term thereof.

CONTRACTOR'S INSURANCE:

Contractor will employ competent men and shall carry public liability insurance and Workmen's Compensation Insurance for protection of customer. Contractor shall also comply with all local ordinances and regulations with regard to licensing and E.P.A. approved facilities.

LANDFILL RATES:

Changes in landfill rates or distances shall effect monthly rates in the month in which they occur. Any change shall be substantiated by the contractor. Contractor may increase the monthly price of collection services provided to the customer by an amount equal to the percentage rate of increase of the landfill costs.

ASSIGNMENT AND BENEFIT:
This agreement and all changes thereto shall be binding on the parties, their successors and assigns.

Taxpayer Ex. No. 6.

15. Taxpayer owned the dumpsters it placed at its customer's location. Tr. pp. 47, 59.

16. Taxpayer was not hired to transport goods its customers entrusted to its care, as would a common or contract carrier for hire; instead, taxpayer was hired to empty the garbage its customers put into taxpayer's dumpsters, and to take the garbage away for disposal. *See* Taxpayer Ex. No. 6.

17. Under the clear terms of its own contracts, taxpayer earned its contract price by emptying the garbage its customers put into taxpayer's dumpsters. Taxpayer Ex. No. 6 (front page, ¶ 3, "The contractor agrees to empty the . . . containers provided by contractor . . . [x] days per week, . . . for a charge of [x] per month. *The initial rate is based on the service described above.*", back page, ¶ 6, "Contractor may increase the monthly price of *collection services provided to the customer* by an amount equal to the percentage rate of increase of the landfill costs.") (emphasis added).

18. While taxpayer introduced its certificate of registration with the Illinois Commerce Commission as an exempt interstate motor carrier of property, during the pertinent period, transporters of garbage, refuse or trash for disposal were not subject to the economic regulatory authority of either the Interstate Commerce Commission ("ICC") or the Illinois Commerce Commission ("ILCC").

Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109 (No. MC-126740) (June 29, 1965); Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(h) (1987).

19. Taxpayer was a private carrier and not a carrier for hire. *See* Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(h)-(i).

**Conclusions of Law:**

The fundamental issue in this matter is whether taxpayer's garbage trucks are subject to the Illinois Use Tax Act's rolling stock exemption, 35 **ILCS** 105/3-55(c) (1992). Before addressing the text of the exemption, it is important to recall that the underlying purpose of the Use Tax Act ("UTA") is to tax all tangible personal property purchased at retail for use in Illinois, even if the property is also used in interstate commerce. Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 1080 (1st Dist. 1992).

When taxpayer purchased its garbage trucks, the UTA's rolling stock exemption provided, in part:

> Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:
>
> * * *
>
> (c) The use, in this state, by owners, lessors, or shippers of tangible personal property that is utilized by interstate carriers for hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for hire.

Ill. Rev. Stat. ch. 120, ¶ 439.3 (1989) (*now* 35 **ILCS** 105/3-55(c) (1996)).

The Department argues that the rolling stock exemption does not apply here because, *inter alia*, taxpayer is not a carrier for hire. Department's Brief, pp. 2-3. Taxpayer argues that it was registered with the Illinois Commerce Commission as an exempt interstate motor carrier of property, it used the trucks regularly interstate, and it provided for-hire service to its customers. *See* Taxpayer's Brief and Summary of Authorities ("Taxpayer's Brief"), pp. 1-5. Taxpayer's arguments, however, do not necessarily lead to the conclusion it seeks, i.e., that the garbage trucks were used by an interstate carrier for hire as rolling stock moving in interstate commerce.

Taxpayer specifically argues that it held itself out "to provide service to all types of customers". Taxpayer's Brief, p. 2. I agree. What I cannot agree with is taxpayer's contention that its primary business was transportation of property for hire. *See* Taxpayer's Brief, p. 5 (Summary). Taxpayer was not "hired by others to transport waste to landfills" (*see id.*, p. 3); at least, its own contracts do not reflect such an agreement.[2] The service taxpayer

[2]. Taxpayer makes other arguments which are inconsistent with its own contracts. For example, taxpayer argues that its charges for service were based, in part, on the distance garbage was transported. Taxpayer's Brief, p. 2. That argument is based solely on the testimony of taxpayer's former president, TAXPAYER PRESIDENT. If TAXPAYER PRESIDENT's testimony were literally true, it would mean that taxpayer could have increased its charges to any customer merely by deciding to transport garbage from a customer to whatever landfill was situated farther away. The text of taxpayer's own contracts, however, reflects that taxpayer's contract price was based on the number of dumpsters taxpayer placed (and agreed to empty) at a customer's location, and the number of collections taxpayer agreed to make per week. Notwithstanding TAXPAYER PRESIDENT's mere testimony, taxpayer introduced no documentary evidence to corroborate its argument that its charges were, in fact or in part, based on the distance taxpayer decided to travel to dump the garbage it was paid to collect. *See* Russell v. Jim Russell Supply, Inc., 200 Ill. App. 3d 855, 870-71 (5th Dist. 1990) (court found presumptive evidence that carrier was a carrier for hire and not a private carrier, in part,

held itself out as performing "for hire" in each contract it entered into was to "provide refuse removal services at [the customer's address]." Taxpayer Ex. No. 6 (front page, ¶ 2).

Taxpayer had one primary contractual responsibility to its customers -- to regularly collect garbage from the dumpsters taxpayer placed at its customer's locations. Taxpayer Ex. No. 6 (front page, ¶ 3, "The contractor agrees to empty the ... containers provided by contractor ... [x] days per week, ... for a charge of [x] per month. *The initial rate is based on the service described above*.") (emphasis added). As part of taxpayer's primary business of providing refuse removal services, taxpayer obviously had to *move* the garbage, that is, it had to transport the garbage elsewhere for disposal by others. Taxpayer's customers, however, agreed to pay taxpayer once taxpayer collected the garbage they threw away into taxpayer's dumpsters.

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because carrier's invoices established that carrier's charges for products varied in proportion to the distance carrier travelled to deliver the products, and the carrier's charge attributable to transportation was consistent with freight charges used by contract carriers for hire).

Next, taxpayer argues that its "[c]harges were increased when costs of interstate operations increased. Taxpayer's Brief, p. 2. Taxpayer regularly (in fact, daily, *see* Taxpayer Ex. No. 5), took garbage from points in Chicago to Hillside, Illinois, where the transportation of garbage stopped at landfills there. Taxpayer's contracts do not provide that taxpayer could pass on to customers only those increases charged by out-of state landfills. A more precise argument would have been that taxpayer could have increased its charge to customers whenever it had to pay more to dump the garbage they paid it to collect. That more precise argument would have suggested, correctly, that taxpayer's primary business was something other than transportation for hire, because such a provision in a contract between a carrier for hire and a shipper would have been void as a matter of law. Ill. Rev. Stat. ch. 95½, ¶ 18c-3209 (1987) (Charges not part of direct transportation cost [void]).

Taxpayer Ex. No. 6. Taxpayer provided a service for hire; it's just that the service provided for hire was not transportation.

It is appropriate in this matter, and perhaps necessary, to look to Illinois and federal commercial transportation statutes and cases to see how the General Assembly, Congress, courts and agencies have distinguished the activities of carriers for hire from the activities of carriers who provide transportation other than for hire. What even a cursory review of those statutes and cases reveals is that not every carrier is a carrier for hire. For example, the Illinois General Assembly has classified carriers into three groups: common carriers, contract carriers and private carriers. *See, e.g.*, Ill. Rev. Stat. ch. 95½, ¶ 18c-1104(7) (definition of common carrier of property by motor vehicle), ¶ 18c-1104(8) (definition of contract carrier of property by motor vehicle), ¶ 18c-1104(27) (definition of private carrier of property by motor vehicle).[3]

When taxpayer bought the garbage trucks,[4] intrastate common and contract motor carriers of property were subject to economic

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[3]. A private carrier by motor vehicle is defined as:

> any person engaged in the transportation of property or passengers by motor vehicle *other than for hire*, whether the person is the owner, lessee or bailee of the lading or otherwise, when the transportation is for the purpose of sale, lease, or bailment and in furtherance of the person's primary business other than transportation. "Private carriers by motor vehicle" may be referred to as "private carriers." Ownership, lease or bailment of the lading is not sufficient proof of a private carrier operation if the carrier is, in fact, engaged in the transportation of property for hire.

Ill. Rev. Stat. ch. 95½, ¶ 18c-1104(27) (1987) (emphasis added).

[4]. As of January 1, 1995, Congress preempted state economic regulation related to price, route or service of most motor carriers

regulation by the ILCC as persons engaged in the business of providing transportation for hire; private carriers were not. Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(i) (1989) (private carriers exempt from ILCC jurisdiction); 92 Ill. Admin. Code, Chap. III, § 1225.5 (1989) (ILCC regulations regarding "Publication, Posting and Filing of Tariffs, Contracts, Schedules and Related Documents", define a "carrier" as "any common or contract motor carrier of property, motor carrier of passengers, rail carrier, or common carrier by pipeline as those terms are defined in the Illinois Commercial Transportation Law."); Allied Delivery System, Inc. v. Illinois Commerce Commission, 93 Ill. App. 3d 656, 65 (5th Dist. 1981) ("Operation of a motor vehicle in the intrastate transportation of property for hire as either a common carrier or a contract carrier requires a permit of authority issued by the [Illinois Commerce] Commission."). Similarly, when taxpayer bought the garbage trucks, interstate common and contract motor carriers of property for hire were subject to economic regulation by the ICC, while interstate private motor carriers of property were not. ICC v. Browning Ferris Industries, Inc., 529 F.Supp. 287, 289-90 (1981) ("Also exempt from the jurisdiction of the ICC is the transportation of property by motor

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of property. 49 U.S.C. § 11501(h)(1) (1995). Matters not covered by the preemption include a state's safety regulatory authority (e.g., the authority to regulate minimum amounts of insurance to be carried, or highway route limitations based on weight or hazardous nature of the cargo carried) (*see* 49 U.S.C. § 11501(h)(2) (1995)), and a state's authority to regulate standard transportation practices (e.g., the authority to regulate uniform practices such as bills of lading used) (*see* 49 U.S.C. § 11501(h)(3) (1995)). A state's authority to impose a fairly-apportioned excise tax on a carrier's use of motor vehicles in the taxing state was not affected by the preemption. *See* 49 U.S.C. § 14505 (1996).

vehicle by a person engaged in a business other than transportation when the transportation is within the scope of and furthers the primary business of that person.") (*citing* 49 U.S.C. § 10524 (*now* 49 U.S.C. § 13505(a) (1996)).

The distinction between carriers for hire and private carriers is important to this matter because rolling stock used by private carriers in interstate commerce is not subject to the UTA's rolling stock exemption. Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 1081-83 (1st Dist. 1992).[5] In Square D Co. v. Johnson, the first district appellate court upheld the constitutionality of a 1967 amendment to Illinois' Use Tax Act which limited the applicability of the UTA's rolling stock exemption to rolling stock used by carriers for hire, and denied the exemption to rolling stock used by private carriers. Square D, 233 Ill. App. 3d at 1081-83. Here, the evidence

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[5]. Neither party to this dispute referred to the Square D Co. decision either at hearing or in their respective memoranda. The only case law cited by taxpayer in its Brief was the case titled Advance Disposal Service, Inc. v. Department of Revenue, No. 94-TX-15, DuPage Co. Circuit Court. Taxpayer's Brief, p. 5. Taxpayer attached a single-page, undated and unsigned agreed order entered in that case as part of an exhibit to its Brief. Taxpayer's Brief, Ex. No. 5. That exhibit also included a transcript of a colloquy between the court, counsel for this taxpayer and an assistant attorney general representing the Department in that case. Taxpayer argued that, since the matter here "stands 'on all fours' with the decision in Advance Disposal Service, Inc., the Department should find that the assessment against TAXPAYER Disposal Company, Inc. should be reversed."

I am without benefit of the briefs or pleadings filed with the court in that case. So, in order to determine whether this case is at all similar to the Advance case, I would either have to trust counsel's characterizations of the facts found to exist there, or look outside the record in this case. I choose to do neither. The exhibit's persuasiveness as an authority applicable to this dispute is suspect because I have no idea whether the carrier in Advance was a private carrier, as is this taxpayer here.

clearly supports the conclusion that taxpayer was a private carrier, and not a carrier for hire.

To begin, persons engaged in the garbage collection business, such as taxpayer here, have been exempted from the regulations otherwise imposed on carriers for hire by both the ILCC and the ICC. Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(h) (1987);[6] Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109, 110 (No. MC-126740) (June 29, 1965) (ICC supported its decision that carrier of rubble and debris for disposal was a private carrier exempt from ICC jurisdiction, in part, by citing to past ICC decisions holding that transportation of garbage for disposal was exempt from economic regulation by the ICC). It is easy to see why persons engaged in the business of transporting the goods of others might be treated differently than persons engaged in the garbage collection business. *See, e.g.*, 13 C.J.S. *Carriers* § 385.[7] In C & A Carbone v. Town of

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[6]. Section 4102 of the ICTL provides, in part:

> § 18c-4102. Exemptions from Commission Jurisdiction.
>
> (1) Enumeration of Exemptions. The provisions of this chapter shall not apply to transportation, by motor vehicle:
>
> * * *
>
> (h) Of waste having no commercial value to a disposal site for disposal.

Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(h) (1987).

[7]. Section 385 of the treatise's article on Carriers provides:

> A carrier of goods is one who undertakes for hire to transport the goods of another, or who is engaged in the business of carrying goods for others for hire.
>
> A shipper or consignor is the owner or person for whose account the carriage of goods is undertaken.
>
> Carriers have a duty, vis-a-vis their relationship to shippers, to safeguard the shipper's interests.

Clarkstown, N.Y., 114 S.Ct. 1677 (1994), the United States Supreme Court recently recognized that "what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it." C & A Carbone, 114 S.Ct. at 1682. That commonsense recognition of the nature of the garbage collection business is particularly helpful here. Taxpayer's contracts do not reflect that taxpayer was being paid or directed to "Take this trash to Trenton", or "Get this garbage to Gary." Taxpayer's customers were paying taxpayer to, "Take this garbage -- please." Taxpayer's customers did not hire taxpayer to "ship" their garbage; they hired taxpayer to get rid of their garbage.

Recognizing the unique nature of taxpayer's business also leads directly to the Department's other argument in this matter. The Department asserts that taxpayer was not a carrier for hire because it was carrying its own property. While I will address that argument, I want to emphasize why the ownership of the commodities being transported is relevant to this dispute. Whether a carrier owns the property it transports is the first criteria courts and the ICC look to when determining whether the primary business of a particular carrier is transportation for hire, or whether the carrier's primary business is something other than transportation for hire. *See, e.g.*, Red Ball Motor Freight v. Shannon, 377 U.S. 311, 316-17 (1964) (Court held that by amending 49 U.S.C. § 203, Congress "meant only to codify the primary business test which, as applied by

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> A shipper of goods must exercise adequate care in packaging and labeling its cargo.

13 C.J.S. *Carriers* § 385 (1990).

the ICC, require[d] an analysis of the ... operations in the factual setting of each case."); Nuclear Diagnostic Labs, Contract Carrier Application, 131 M.C.C. 578, 582-84, No. MC-141218 (June 4, 1979) (using primary business test criteria, ICC analyzed activities of carrier engaged in business of collecting and transporting for disposal radioactive waste, and found carrier to be private carrier not subject to jurisdiction of the ICC); Russell v. Jim Russell Supply, Inc., 200 Ill. App. 3d 855, 866 (5th Dist. 1990) (applied Wisconsin Supreme Court's modified primary business test criteria (*see immediately infra*), and found that a party established *prima facie* evidence that a carrier violated a no-compete clause contained in its prior contract to sell trucking business, by engaging in the business of trucking for hire); Gensler v. Wisconsin Department of Revenue, 71 Wis. 2d 1108 (1975) (person found to be a contract carrier for hire, rather than private carrier, could claim exemption from Wisconsin sales and use tax on property used in business).

The Department argues that taxpayer acquired title to the garbage it carried in its trucks because its customers abandoned the garbage when they threw it away into taxpayer's dumpsters. Taxpayer specifically disputes that it owned the garbage it carried. Taxpayer's Brief, p. 3. While taxpayer's contracts do not include an express provision by which taxpayer agreed to take title to the garbage it collected from its dumpsters, taxpayer's ownership of the garbage may be inferred from its actions with respect to those agreements, and based on the same recognition of the nature of taxpayer's business shown by the United States Supreme Court in C & A Carbone.

Taxpayer's customers hired taxpayer to take away property they didn't want anymore. The customers (or the residents of the apartment buildings or condos whose managers engaged taxpayer, *see* Tr. p. 46) identified the property they didn't want anymore by putting it in the dumpsters taxpayer provided for that purpose. Under Illinois law, when a person knowingly and voluntarily relinquishes all rights to personal property, the person has abandoned the property. Hendle v. Stevens, 224 Ill. App. 3d 1046, 1056 (2d Dist. 1992) ("property is abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person").

It seems reasonable to accept, as a general proposition, that abandonment is part and parcel of the garbage collection business. Taxpayer's contracts do nothing to detract from the applicability of that general proposition here. For example, taxpayer's contracts do not provide for the possibility that, were taxpayer to find its access to landfills denied, taxpayer would be required, entitled or even physically able[8] to return whatever garbage it collected to the specific customer who, taxpayer suggests, retained title to it. The absence of such a provision is perfectly understandable, given the nature of taxpayer's business. What rational purchaser of garbage collection services would want the garbage he threw away returned to him?

[8]. I presume that taxpayer conducted its business on a route, so that the garbage it collected from one dumpster was commingled in the truck with garbage collected from other dumpsters.

Taxpayer's implied argument that its customers retained title to the garbage they threw away also contradicts black-letter Illinois law on the subject of abandonment. Illinois courts have long accepted the majority view that, for fourth amendment purposes, garbage set out for collection is subject to warrantless search by the police because whoever put it out for collection abandoned any reasonable expectation of privacy in the contents. People v. Collins, 106 Ill. 2d 237, 264-66 (1985) (garbage bag placed on second floor landing of multi-unit apartment complex, next to criminal defendant's door, was properly subject to warrantless search by the police because defendant abandoned any reasonable expectation of privacy he might have had in the contents of the garbage by putting it out for collection); People v. Huddleston, 38 Ill. App. 3d 277, 270 (3d Dist. 1976) (the first Illinois appellate court to address the issue specifically rejected the minority view). The only logical inference to be drawn from the evidence is that the garbage put into taxpayer's dumpsters was abandoned property. People v. Collins, 106 Ill. 2d at 264-66; Hendle v. Stevens, 224 Ill. App. 3d at 1056.

Notwithstanding taxpayer's argument that it "had no incidents of ownership" in the garbage (*see* Taxpayer's Brief, p. 2), taxpayer's regular (and, I presume, economically motivated) decision to dump garbage at the out-of-state landfill where it was charged less tipping fees certainly appears to be an exercise of *some* interest in the garbage, i.e., the right to attempt to increase its profit by deciding where to take garbage for disposal. Once collected in its trucks -- and to the extent the garbage could be said to "belong" to anyone, I agree with the Department that the garbage "belonged" to

taxpayer, the possessor. Visco v. Pickrell, 388 P.2d 155, 163 (Ariz. 1963) (trash hauled by garbage carrier is abandoned property); *see also*, Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109, 110 (No. MC-126740) (June 29, 1965) (ICC ruled that carrier was a private carrier who "carried on its own behalf", where carrier transported for disposal rubble and debris excavated during construction projects, and where the hiring contractors did not care where the carrier took the debris for disposal). Not incidentally, the Department's regulations provide that the term "rolling stock" does not include the "vehicles ... used by a person ... to transport property which such person owns ...." 86 Ill. Admin. Code § 130.340(b) (1981).

Finally, and although I have concluded that taxpayer was transporting property to which it held the best claim of title, I don't believe that conclusion was required to be made in order to resolve this dispute. While transportation was undoubtedly a necessary part of taxpayer's business operations, taxpayer's transportation of garbage was incidental to and in furtherance of its primary business of providing refuse removal services. The Illinois General Assembly has declared, and Illinois courts have recognized, such transportation to be private carriage. Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(i); Russell v. Jim Russell Supply, Inc., 200 Ill. App. 3d 855, 866 (5th Dist. 1990) ("A private carrier is not subject to either Illinois or Interstate Commerce Commission regulation and is defined by Illinois statute to be "any person engaged in the transportation of property or passengers" "where the transportation is incidental to and within the scope of the person's primary

business purpose, and the primary business is other than transportation.") (*citing* Ill. Rev. Stat. ch. 95½, ¶¶ 18c-1104(27), 18c-4102(i) (1987)) (internal brackets omitted); *see also* Elgin Storage & Transfer Co. v. Perrine, 2 Ill. 2d 28, 34-35 (1953).[9]

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[9]. In Elgin, the Illinois Supreme Court analyzed the purpose of the Motor Carrier of Property Act (the predecessor to the ICTL) vis-a-vis the exemptions set forth in § 3 thereof (now § 4102 of the ICTL) when ruling on a uniformity challenge to that nascent legislation. Elgin, 2 Ill. 2d at 31.

The Illinois Supreme Court held:

> [I]t may be said, in general, that the Illinois Motor Carrier of Property Act, establishes a plan for the regulation of motor carriers of property for hire similar to the regulation of public utilities under the Illinois Public Utilities Act. [citations omitted] . . . An analysis of the act shows that it is not the regulation of motor vehicles as such, but the regulation of the business of transportation, for the legislature expressly declares, in section I thereof, that *it is "the business of the transportation of property for hire by motor vehicle" which is to be supervised and regulated. It is, therefore, with the expressed legislative purpose and design in mind that the exemptions in section 3 must be read and in particular paragraph (g) thereof*.
>
> The touchstone of modern statutory construction is not the purport of the text but the import of its context. To read subparagraph (g) literally, as plaintiff urges, would be to permit any carrier, otherwise subject to the act, to avoid the regulation to which he was intended to be subjected by the devise of transporting some (and no one knows how much or how little) of the specified agricultural commodities. The plaintiff's own argument, by demonstrating the complete impracticability of such a construction, also demonstrates that it was not the construction intended by the legislature. *We hold, therefore, that section 3(g) was intended to do no more than to emphasize the exemption of those who are not engaged in the business of motor transportation for hire* but who haul their own agricultural supplies and commodities . . . .

Elgin, 2 Ill. 2d at 34-35 (emphasis added).

The Illinois General Assembly has always exempted from ILCC jurisdiction persons who, as a matter of fact, transport property by

Regardless who owned the garbage taxpayer collected and carried, taxpayer was still engaged in a primary business other than transportation for hire.

**Conclusion**

Taxpayer was a private carrier engaged in the primary business of providing refuse removal services. As an incident to, and in furtherance of taxpayer's primary business, taxpayer transported "by motor vehicle ... waste ... to a disposal site for disposal". Ill. Rev. Stat. ch. 95½, ¶ 18c-4102(h)-(i) (1987). Because it was a private carrier, taxpayer's garbage trucks were not used by a carrier for hire. Square D Co. v. Johnson, 233 Ill. App. 3d at 1081-83 & n.7. Taxpayer has not rebutted the *prima facie* correctness of the Department's corrections of taxpayer's use tax returns. Department Group Ex. No. 1.

I recommend that Notice of Tax Liability number XXXXX, which was based on the Department's correction of taxpayer's returns, be finalized as issued, with interest to accrue pursuant to statute.

Date

Administrative Law Judge

motor vehicle merely as an incident to and in furtherance of a primary business other than transportation for hire. Ill. Rev. Stat. ch. 95½, ¶ 282.3(h) (1953); Elgin, 2 Ill. 2d at 31-32. In Elgin, the Illinois Supreme Court held that, in general, the statutory exemptions to ILCC jurisdiction should be recognized as the identification of those persons who are not to be regulated as being engaged in the business of providing motor transportation of property for hire *because the legislature has declared them to be not so engaged*. I make these observations in a footnote because, to my knowledge, no Illinois court has analyzed a rolling stock exemption challenge by specific reference to the ICTL and its exemptions, or to the Illinois Supreme Court's Elgin decision, although I believe the appellate court's holding in Square D Co. v. Johnson is fully supported by either.